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8 ADOBE SYSTEMS INCORPORATED,
9 Plaintiff,
10 v.
11 SOFTWARE TECH, et al.,
12 Defendants.
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15 Case No. 5:14-cv-02140-RMW
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**ORDER GRANTING MOTION FOR
CONTEMPT AND SANCTIONS**

18 Plaintiff Adobe Systems Inc. moves to hold defendants Pierre Francis, La Boutique du
19 Softwaretech, Inc., Software Tech, Software Tech Store, and Futur-Soft Solutions Corporation
20 (collectively, “defendants”), in contempt and liable for sanctions for defendants’ violations of this
21 court’s Preliminary Injunction. Dkt. No. 64 (Mot.); Dkt. No. 32 (Prelim. Inj.). For the reasons
22 explained below, the court GRANTS the motion for contempt and sanctions.

I. BACKGROUND

23 Adobe makes various software products, including “ACROBAT®, ACROBAT
24 CAPTURE®, ADOBE AUDITION®, ADOBE PREMIERE®, AFTER EFFECTS®,
25 CONTRIBUTE®, CREATIVE SUITE®, CS LIVE®, DREAMWEAVER®, ENCORE®,
26 FIREWORKS®, FLASH®, FLASH BUILDER®, FLASH CATALYST®, ILLUSTRATOR®,
27 INDESIGN®, LIGHTROOM®, PHOTOSHOP®, PRELUDE®, SPEEDGRADE®, and

1 VERSION CUE®.” Dkt No. 54 (First Amended Complaint or “FAC”) ¶ 25. Defendants sell
2 Adobe products through various websites. Dkt. No. 75-1 (Francis Decl.) ¶ 8. Defendants’
3 business model is such that:

4 the majority of Software Tech’s software sales are for a digital
5 download. Whether given to a customer via digital download or
6 physical media, a typical transaction between Software Tech and a
7 customer involved the customer ordering software from the
8 Software Tech website and downloading the software through the
9 Software Tech website or receiving an installation disk via UPS,
FedEx, etc. Software Tech purchased an activation key for the user
from an approved first-tier or second-tier distributor, provided it to
the customer, and the customer would then activate the software
with Adobe using the activation key or serial numbers provided by
Software Tech.

10 *Id.* ¶ 15. Adobe alleges the defendants’ sales violate Adobe licensing policies, which place
11 various restrictions on how Adobe serial numbers are distributed to customers. *See* Dkt. No. 64-3
12 (Draper Decl.). In essence, Adobe alleges that defendants improperly re-use Adobe serial
13 numbers, thereby selling the same software product multiple times.

14 **A. The Prior Action and March 22, 2013 Permanent Injunction**

15 Plaintiff previously brought an action against defendants Futur-Soft Solutions Corporation
16 and Pierre Francis for similar conduct to that alleged here. *See Adobe Systems Incorporated v.*
17 *Matthew Rene, et al.*, Northern District of California Case No. 3:11-cv-03885-CRB (the “Prior
18 Action”). The parties entered into a Confidential Settlement Agreement to resolve that matter, and
19 the court entered a Permanent Injunction and Dismissal with Prejudice on March 22, 2013. Dkt.
20 No. 64-8. The Permanent Injunction prohibits defendants Futur-Soft Solutions Corporation and
21 Pierre Francis from:

22 [§ 5.a] Infringing Plaintiff’s Properties, either directly or
23 contributorily, in any manner, including generally, but not limited to
manufacturing, importing, distributing, advertising, selling and/or
offering for sale any unauthorized product which features any of
24 Plaintiff’s Properties, including, but not limited to, any product sold
outside specified channels or in a manner which violates the terms
of Plaintiff’s distribution agreements, including, but not necessarily
25 limited to, academic, OEM, or foreign-made versions of Plaintiff’s
software (collectively “Unauthorized Products”).

26 Dkt. No. 64-8 at 46. Thus, the Permanent Injunction prohibits defendant Francis from dealing in
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1 “unauthorized” Adobe products. *Id.*

2 **B. This Action and October 9, 2014 Preliminary Injunction**

3 Plaintiff filed the instant suit on May 9, 2014. On October 7, 2014 the parties stipulated to
4 a Preliminary Injunction, which the court entered on October 9, 2014. Dkt. No. 32. The
5 Preliminary Injunction prohibits defendants from:

6 (a) importing, exporting, downloading, uploading, marketing,
7 selling, offering for sale, distributing or dealing in any product or
service that uses, or otherwise making any use of, any of Plaintiff’s
Trademarks or Copyrights . . .

8 (b) importing, exporting, downloading, uploading, marketing,
9 selling, offering for sale, distributing or dealing in any activation
codes, keys, or serial numbers relating to any of Plaintiff’s purported
10 Trademarks or Copyrights . . .

11 (c) importing, exporting, downloading, uploading, marketing,
12 selling, offering for sale, distributing or dealing in any product or
service that uses, or otherwise making any use of, any Original
13 Equipment Manufacturer (“OEM”), educational or academic
14 (“EDU”), government, foreign-made, Volume Licensing, or Adobe
Employee Software Purchasing Program software, activation keys,
code, or serial numbers relating to Plaintiff’s Trademarks or
15 Copyrights . . .

16 *Id.* ¶ 1. The Preliminary Injunction is broader than the Permanent Injunction in that the
17 Preliminary Injunction prohibits *all* sales of Adobe products, not just “unauthorized” products.

18 **C. Alleged Violations of the Preliminary Injunction**

19 Adobe uses investigators to purchase Adobe products from third parties and then checks to
20 ensure the product has been properly licensed. Dkt. No. 64-3. Adobe’s investigator made several
21 purchases of Adobe products from defendants’ websites, including purchases after the entry of the
22 Preliminary Injunction. *Id.* The sales Adobe uncovered violated the Preliminary Injunction and
23 also violated Adobe’s licensing policies. For example, Mr. Draper declares that:

24 I have analyzed the serial number contained in an email sent on
25 December 23, 2014, from sales@thesoftwaretechstore.com to a
26 customer. A true and correct copy of this email is attached to the
27 Declaration of Haik Moushaghyan as Exhibit C. This serial number
is for an unauthorized Educational Volume Licensed (TLP) version
of Adobe Photoshop CS6. This serial number was not generated
until August 28, 2014, and is not registered to the customer in the
December 23, 2014, email. It has been activated a total of 15 times.

None of the users have any business affiliation with each other.
None of the users appear to be qualified as educational users.

Id. ¶ 13.

In addition, on February 7, 2015, Adobe’s investigator made a purchase of an “Adobe Acrobat Professional 11 XI – Download Windows Master Key” from the website located at preloadmypc.com. Draper Decl. ¶ 19, Ex. Z. On February 11, 2015, Adobe received an email from defendants, through the email address sales@preloadmypc.com, providing a serial number for the investigator’s purchase. *Id.* ¶ 19, Ex. AA. This serial number was for an unauthorized Volume Licensing (TLP) product sold outside of Adobe’s licensing restrictions. *Id.* at ¶ 19.

D. Adobe's Motion for Contempt and Sanctions

Adobe filed its motion for contempt and for sanctions on May 15, 2015. Dkt. No. 64. Defendants filed an opposition on July 3, 2015, Dkt. No. 75, and Adobe filed a reply on July 17, 2015, Dkt. No. 77. The court held oral argument on the motion on July 31, 2015, Dkt. No. 81, and set an evidentiary hearing, Dkt. No. 84. The court held an evidentiary hearing on October 30, 2015 during which Adobe presented testimony from Michael Draper, Adobe’s global manager of piracy investigations. Defendants failed to appear at the hearing even after the court rescheduled the hearing at the parties’ request, *see* Dkt. No. 93.

II. ANALYSIS

Civil contempt “consists of a party’s disobedience to a specific and definite court order by failure to take all reasonable steps within the party’s power to comply.” *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993); *see also Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986) (“Civil contempt occurs when a party fails to comply with a court order.”). “The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the [nonmoving party] violated a specific and definite order of the court.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City & County of San Francisco*, 968 F.2d 850, 856 n. 9 (9th Cir. 1992)). The contempt “need not be willful,” and there is no good faith exception to the requirement to obey a court order. *In re Crystal Palace Gambling Hall, Inc.*, 817

1 F.2d 1361, 1365 (9th Cir. 1987). Here, Adobe has the burden of proving by clear and convincing
2 evidence that defendants violated the preliminary injunction by continuing to purchase or sell
3 Adobe products after the court issued its preliminary injunction.

4 In support of its motion for contempt and for sanctions, Adobe submitted declarations from
5 its global manager of piracy investigations and from several of defendants' former employees, as
6 well as documentary evidence. *See* Dkt. Nos. 64-1 – 64-6, 77-1 – 77-8. In opposition, defendants
7 submitted declarations from Pierre Francis, the sole officer of defendants Software Tech and
8 Futur-Soft, as well as documentary evidence. *See* Dkt. Nos. 75-1 – 75-14. After reviewing the
9 parties' submissions, the court found that although there were serious questions raised about the
10 admissibility and credibility of defendants' evidence, an evidentiary hearing was necessary before
11 the court could rule on the merits of the motion. Dkt. No. 84 at 6. As previously noted, the court
12 held the evidentiary hearing on October 30, 2015. Defendants failed to appear at the hearing, and
13 the testimony of Adobe's witness Mr. Draper went unrebutted. Defendants made no attempt to
14 address the court's concerns with their evidence. Based on the parties' written submissions and
15 Mr. Draper's testimony, the court finds that Adobe has shown by clear and convincing evidence
16 that defendants violated the Preliminary Injunction and that sanctions are appropriate.

17 **A. Defendants Violated the Court's Preliminary Injunction**

18 There is little to no dispute between the parties that defendants actually violated the terms
19 of the Preliminary Injunction¹ by selling Adobe products. *See* Dkt. No. 75 at 13. Defendants'
20 opposition brief admits that the February 7, 2015 sale violated the Preliminary Injunction: "The
21 Motion only specifically identifies a single instance of alleged contempt of any reliable
22 authenticity." *Id.* The Preliminary Injunction explicitly states that Software Tech may not sell or
23 distribute any "activation codes, keys, or serial numbers relating to any of Plaintiff's purported
24 Trademarks or Copyrights." Dkt. No. 32 § 1(b). Defendants' excuse is that "[i]n the early stages

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27 ¹ This court previously held that Adobe's request for enforcement of the permanent injunction in
28 the Prior Action should be brought before the judge who issued that injunction. Dkt. No. 84 at 5.
Accordingly, this order does not address the permanent injunction.

1 of this case, [Francis's] understanding was that the Preliminary Injunction allowed [Francis],
2 Software Tech, and related entities to sell the same types of Adobe software that were permitted
3 under the Permanent Injunction." Francis Decl. ¶ 59. This was an unreasonable interpretation of
4 the Preliminary Injunction, given the express language contained therein. *Id.* ¶ 61 ("I realize that
5 my original understanding of the Preliminary Injunction was incorrect.").

6 Although defendants acknowledge that the February 7, 2015 sale violated the Preliminary
7 Injunction, defendants' argue that they should not be held in contempt and sanctioned because the
8 sales of Adobe products "stemmed from a vast conspiracy of former employees of Software Tech
9 to defraud defendants Pierre Francis and Software Tech out of hundreds of thousands, if not
10 millions, of dollars." Dkt. No. 75 at 1. Defendants rely on the declaration of Francis, who states
11 that he "entrusted the day-to-day operations of the business to a key set of employees," who, it
12 turns out, have "systematically defrauded [him] over a number of years." Dkt. No. 75-1 ¶¶ 17, 20.
13 Francis claims that he has sued at least two of his now-former employees in Canadian court. *Id.*
14 ¶ 22. Francis also states that the evidence Adobe relies upon in support of its motion (including
15 depositions/declarations of former Software Tech employees, emails, and text messages) is false
16 or was fraudulently created by the former employees. *See, e.g., id.* ¶ 42 ("The declaration of Mr.
17 Moushaghayan in support of Adobe's Motion includes false information. In particular, the
18 purported text message exchange between me and Mr. Moushaghayan is entirely fabricated."); *id.*
19 ¶¶ 87-94.

20 Defendants' arguments that they should not be held in contempt are unpersuasive. First,
21 there is no doubt that the corporate defendants, La Boutique du Softwaretech, Inc., Software Tech,
22 Software Tech Store, and Futur-Soft Solutions Corporation, are liable for the Adobe sales as the
23 sales were made from the corporations' websites. A corporation can only act through its
24 employees, agents, directors or officers, and thus, corporations are responsible for the acts of those
25 same persons. *S.E.C. v. Jenkins*, 718 F. Supp. 2d 1070, 1075 (D. Ariz. 2010) (citing *In re Am.*
26 *Int'l Group, Inc.*, 965 A.2d 763, 802, 823 (Del. Ch. 2009)). In addition, Francis set up and
27 controlled the bank accounts associated with the corporate websites. Dkt. No. 77-5 (Drey Decl.)

¶ 7 and Ex. OO (M. Verma Dep.).

Second, some of the unauthorized purchases at issue occurred *after* defendants fired the employees involved in the alleged conspiracy between November 2014 and January 2015. *See* Dkt. No. 77 at 6; Dkt. No. 75-1 (Francis Decl.) ¶¶ 36, 45, 50, 53, 56 & 57. At the October 30, 2015 hearing on the instant motion, Adobe presented unrebutted testimony that product serial numbers associated with defendants' sales were being used to activate Adobe software as late as October 28, 2015. Thus, defendants' protestation that the sales were the result of the conduct of rogue employees cannot account for all violations of the Preliminary Injunction.

Third, Francis's professed ignorance of the scheme is not persuasive. Defendants FutureSoft Solutions and Francis have been on notice that they were selling Adobe products in violation of Adobe's licensing policies for over two years, since the filing of the Prior Action. Francis is "in charge of the big picture aspects of Software Tech, including handling large financial issues (e.g., paying bills, managing the bank accounts of the business, and paying employees, contractors, and service providers) and staffing decisions." Dkt. No. 75-1 ¶ 16. Nonetheless, Francis avers that "rogue employees deleted a substantial number of computerized business records for a period of at least a year and a half without [his] knowledge." *Id.* ¶ 32.² If Francis was admittedly responsible for "handling large financial issues" such as "paying bills," Francis should have discovered the "vast" fraud extending over a two-year period. Moreover, Francis engaged in the same improper behavior of which he accuses his employees, including shipping Adobe products to his home or homes of immediate family members and not to business addresses, "presumably in an effort to avoid Adobe's internal system from flagging too much product being sent to one person or company." Dkt. No. 77 at 8 (citing invoices from supplier Tiger Direct (Dkt. No. 77-8)).

In sum, the court finds that Adobe has shown by clear and convincing evidence that defendants violated the terms of the Preliminary Injunction. *Dual-Deck*, 10 F.3d at 695.

² The court strikes Adobe's separately filed evidentiary objections to the Francis declaration, Dkt. No. 76, per Local Rule 7-3(c) ("Any evidentiary and procedural objections to the opposition must be contained within the reply brief or memorandum.").

1 **B. Sanctions Are Appropriate**

2 Civil contempt sanctions serve may serve two purposes: “to coerce obedience to a court
3 order, or to compensate the party pursuing the contempt action for injuries resulting from the
4 contemptuous behavior, or both.” *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380
5 (9th Cir. 1986) (citing *United States v. United Mine Workers*, 330.U.S., 258, 303-04 (1947)).
6 Adobe requests a monetary sanction in the form of actual damages, defendants’ profits, treble
7 damages, and/or statutory damages. Adobe also requests attorney’s fees and costs in connection
8 with this proceeding.

9 Defendants argue that because the rogue employees have been terminated, and Francis
10 now understands the scope of the Preliminary Injunction, defendants will not violate the
11 Preliminary Injunction going forward. Thus, defendants argue, there is no coercive purpose for
12 sanctions. Dkt. No. 75 at 17. The court disagrees. As noted above, at the evidentiary hearing on
13 this motion, Adobe presented unrebutted testimony and documentary evidence indicating that
14 product serial numbers associated with defendants were being used to activate Adobe software as
15 recently as October 28, 2015, months after the allegedly offending employees were fired. *See* Dkt.
16 No. 98 (Hearing Exhibit A showing product activations). Thus, coercive sanctions may be
17 appropriate in this case. Nevertheless, because Adobe’s main argument at the hearing on this
18 motion centered on compensation, the court turns to that basis for sanctions.

19 Defendants argue that sanctions would have no compensatory purpose because Adobe has
20 not shown any actual loss from the improper sales. Adobe responds, and defendants do not
21 dispute, that Adobe may be entitled to actual damages and profits or statutory damages pursuant to
22 the Copyright Act and the Lanham Act. *See* 17 U.S.C. § 504; 15 U.S.C. § 1117; *BMG Music v.*
23 *Perez*, 952 F.2d 318, 320 (9th Cir. 1991) (affirming contempt sanctions of \$10,000 per violation
24 of the preliminary injunction based on statutory damages for copyright infringement); *Jerry’s*
25 *Famous Deli, Inc. v. Papanicolaou*, 383 F.3d 998, 1004 (9th Cir. 2004) (approving of
26 disgorgement of profits as measure for contempt sanction in trademark action). Accordingly, the
27 court finds that compensatory sanctions are appropriate in this case.

1 The court thus turns to the question of determining an appropriate amount for the
2 sanctions. Here, Adobe presented unrebutted testimony from Mr. Draper, Adobe's global
3 manager of piracy investigations. Adobe's manager testified that after this court issued the
4 Preliminary Injunction on October 9, 2014, there have been 17,146 unauthorized activations of
5 Adobe software products using license keys associated with defendants. Adobe's manager also
6 submitted a report showing the product name, date, machine ID, serial number, and IP address
7 associated with each of these activations. *See* Dkt. No. 98. The report listed 19 separate Adobe
8 products and showed the retail value of each Adobe product involved in each product activation.
9 *Id.* In total, Mr. Draper's report estimated that these unlicensed activations were worth
10 \$14,842,254. *Id.*

11 The court finds that the evidence Adobe has submitted to date is insufficient to support an
12 award of actual damages. "Actual damages are usually determined by the loss in the fair market
13 value of the copyright, measured by the profits lost due to the infringement or by the value of the
14 use of the copyrighted work to the infringer." *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d
15 700, 708 (9th Cir. 2004) (quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566
16 (7th Cir. 2003)). Even if the court were to accept the rather questionable assumption that, but for
17 defendants' infringement, Adobe would have made 17,146 additional sales, Adobe still has
18 presented evidence only of the gross revenue it lost, not of its lost profits. "In order to determine
19 plaintiff's lost profits, it is necessary to deduct from the gross amount of lost sales whatever
20 increase in costs (including overhead) plaintiff would have incurred if such lost sales had in fact
21 been made." 5-14 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 14.02[A][1].
22 *See also Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 843 (9th Cir.
23 2014) (explaining trademark plaintiff's burden to submit evidence of deductible expenses
24 necessary to calculate lost profits). Adobe presented no evidence of its costs or its profit margin.

25 Similarly, while courts have awarded contempt sanctions based on an infringer's profits,
26 *see Jerry's Famous Deli*, 383 F.3d at 1004, Adobe apparently has not yet been able to obtain sales
27 figures from defendants that would enable Adobe to calculate defendants' revenue from violations

1 of the Preliminary Injunction.³ *See* Dkt. No. 64 at 18. Accordingly, on the present record, the
2 court has no evidence to support basing a sanction on infringer's profits.

3 As Adobe points out, a court may award sanctions based on statutory damages for
4 copyright infringement. *See* Dkt. No. 77 at 14 (citing *BMG Music v. Perez*, 952 F.2d 318, 320
5 (9th Cir. 1991)). In this case, the court finds it appropriate to grant a sanction based on statutory
6 damages. The maximum amount of statutory damages available for willful copyright
7 infringement is \$150,000 per infringed work. *See* 17 U.S.C. § 504(c). The court finds that Adobe
8 has shown that defendants willfully violated the Preliminary Injunction by continuing to sell
9 Adobe products without authorization. As noted above, the report Adobe submitted during the
10 evidentiary hearing on this motion listed 19 separate Adobe products that defendants have sold
11 without authorization following entry of the Preliminary Injunction. To compensate Adobe for its
12 losses, the court awards a sanction of \$100,000 per infringed work, for a total of \$1,900,000.

13 As Adobe has not presented evidence of costs or attorney's fees in connection with its
14 motion, the court declines to reach whether such a remedy would be appropriate at this time.

15 **III. ORDER**

16 For the reasons explained above, the court GRANTS the motion for contempt and awards
17 sanctions to Adobe in the amount of \$1,900,000.

18 Within 10 days of the date of this order, defendants shall produce to plaintiff all
19 documents: (1) related to or evidencing all of Defendants' PURCHASES of software from
20 October 9, 2014, to the present bearing plaintiff's trademarks and containing plaintiff's copyrights
21 provided in Exhibits "A" and "B" of the Preliminary Injunction; and (2) related to or evidencing
22 all of defendants' SALES of software from October 9, 2014, to the present bearing plaintiff's
23 trademarks and containing plaintiff's copyrights provided in Exhibits "A" and "B" of the
24 Preliminary Injunction.

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27 ³ If Adobe were able to present evidence of defendants' gross revenues due to infringement, the
burden would then shift to defendants to show their deductible expenses. *See* 17 U.S.C. § 504(b);
15 U.S.C. § 1117(a).

1 If plaintiff wishes to pursue sanctions based on actual damages or infringer's profits
2 instead of sanctions based on statutory damages, and/or if plaintiff wishes to pursue attorney's fees
3 and costs in connection with this proceeding, plaintiff shall file a brief not to exceed 5 pages,
4 along with a supporting declaration and documentation, within 21 days of the date of this order. If
5 defendants contest the amount requested, they may submit a response of no more than 3 pages
6 within 14 days of Adobe's submittal of the requested information.

7 **IT IS SO ORDERED.**

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9 Dated: November 10, 2015

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11 Ronald M. Whyte
United States District Judge

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United States District Court
Northern District of California